STATE OF MICHIGAN

COURT OF APPEALS

JAMI L. THADEN, TERI L. BEALE, and JONI S. MERINO, Plaintiffs/Counter Defendants-Appellants,	UNPUBLISHED November 1, 2011
V	No. 299036 Alcona Circuit Court
JOYE L. GORINAC and LAVERNE GORINAC, Defendants/Counter Plaintiffs-Appellees.	LC No. 09-001308-CH

Before: STEPHENS, P.J., and SAWYER and K. F. KELLY, JJ.

PER CURIAM.

This case involves a family dispute over a lakefront cottage. The trial court ordered that the cottage be sold and prohibited the parties from bidding at the auction. The court also granted defendants an easement over the driveway of the subject property. Plaintiffs appeal as of right. We reverse the exclusion of the plaintiff's from participation in the auction of the subject property, vacate the imposition of the easement on that property and remand for further consideration of the propriety of an easement.

I. Facts

Plaintiffs have a two-thirds interest in the property at the center of this dispute, and defendants own the remaining third. Defendants also own another cottage located directly next door to the subject property. These two properties share a semi-circular driveway that meets the road on the lots to either side of the subject lot. Defendants obtained their interest in the subject property in 1990. Plaintiffs obtained their interests in 2006. The parties had disagreements over a number of repairs and updates to the subject property, particularly an addition that was built shortly after plaintiffs acquired their interest. Plaintiffs charged that defendants refused to pay their share of the bills, while defendants countered that plaintiffs did not have their consent for many of the projects. Plaintiffs eventually brought this suit seeking partition of the subject property. The trial court found that the property could not be partitioned without prejudice to the parties because it consists of a single building on a single lot, and because of the amount of animosity between the parties. Accordingly, the court ordered a sale at public auction, excluded the parties from participating in that auction and subjected the property to an easement.

II. STANDARD OF REVIEW

"When reviewing an equitable determination reached by the trial court, we review the conclusion de novo, but we review the supporting findings of fact for clear error." *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 67; 577 NW2d 150 (1998). A finding is clearly erroneous if, though there may be evidence to support it, this Court is left "with a definite and firm conviction that a mistake has been made." *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 171; 530 NW2d 772 (1995). Questions of law such as statutory interpretation are subject to review de novo. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000).

III. TRIAL COURT'S FINDINGS OF FACT

Plaintiffs first argue that the trial court made several errors in its factual findings. We find no clear errors that would require reversal. The trial court did err by referring to the property as a year-round home. All of the testimony indicated that it has never been used in the winter and that it was always winterized. This error is irrelevant however. Plaintiffs claim it was the basis for the trial court to "shift" the equities in favor of defendants, but a review of the court's opinion reveals that the court did not find that the equities favored either party. The reference to a year-round home was made in the context of discussing the fact that the parties do not get along, which neither party disputes. The court did not apportion blame for the state of affairs, and there is no indication that the characterization influenced any significant aspect of the opinion.

Plaintiffs also argue that the court erroneously considered an appraisal that was not in evidence. However, Teri Beale testified without objection to the result of the challenged appraisal, so this argument is unavailing. Plaintiffs also suggest that the court should have used the state equalized value to determine value. However, no such information is in the record. Plaintiffs also take issue with the trial court's finding that they made improvements without defendants' consent, while at the same time conceding that they altered the plans for the addition without defendants' agreement.

Plaintiffs point out that the trial court mistakenly stated that the decrease in value of the property from 2008 to 2009 was .85 percent, when it was actually 15 percent. The court presumably subtracted 15 percent by multiplying by .85. This appears to be a mere misstatement of mathematical terms. It had no effect on the result of the court's calculations.

IV. RESTRICTIONS ON PUBLIC SALE

Plaintiffs next argue that the trial court did not have authority to prevent them from bidding on the subject property at the public auction. MCL 600.3332 states that if the court finds that a property cannot be partitioned without prejudice to the owners, "the court may order the circuit court commissioner to sell the premises which cannot be divided or partitioned, at a public auction to the highest bidder." When interpreting a statute, this Court is to "give effect to the Legislature's intent as expressed in the statute's terms, giving the words of the statute their plain and ordinary meaning." *Provider Creditors Comm v United American Health Care Corp*,

275 Mich App 90, 95; 738 NW2d 770 (2007). If the language of the statute is not ambiguous, the Court need simply enforce the statute as written. *Id.*

MCL 600.3332 is effectuated through MCR 3.401 through 3.403. Neither the statute nor the court rules defines the term "public auction." Plaintiffs argue that the word "public" includes every member of the community. Indeed, the court rule implementing the auction procedure prohibits only the person conducting the sale or a conservator of a minor or legally incapacitated individual from purchasing the premises. MCR 3.403(B)(2).

Because the statute provides for a public auction, plaintiffs argue that the trial court could not exclude members of the public from the auction. Plaintiffs contend that the statute creates an adequate legal remedy, and that the judiciary may not create additional remedies by invoking equitable doctrines, citing *St Helen Resort Ass'n v Hannan*, 321 Mich 536, 543; 33 NW2d 74 (1948). However, MCL 600.3332 is part of the Revised Judicature Act (the RJA), which provides that partition actions are equitable in nature. MCL 600.3301. In *Saur v Rexford*, 369 Mich 338; 119 NW2d 669 (1963), our Supreme Court affirmed an order, based on a suit for partition, allowing only one of the interested parties to purchase the contested property. *Id.* at 339-340. On motion for rehearing, the Court stated:

> The public sale provisions of past and present statutes relating to partition . . . are permissive rather than mandatory. They do not for regularly expressed reasons control the shape or nature of the decree which by equity's maxims should be entered when the time for decree arrives. [*Id.* at 340-341.]

Plaintiffs point out that *Saur* is based on an earlier statute. The RJA did not take effect until 1963, and did not control in *Saur* because the suit was filed in 1959. *Id.* at 339. However, the Court's statement that partition statutes are permissive cited to both the old, controlling statute and the RJA. *Id.* at 340 n *. The version of the RJA cited in *Saur* includes the same statement that actions for partition are equitable in nature. 1961 PA 236, MCL 600.3301. Therefore, the existence of the statutory remedy of a public sale does not alter the equitable nature of the case, and a trial court has the power, in appropriate circumstances, to apply a different remedy.

Nonetheless, we find *Churchville v Varner*, 502 So 2d 53, 54 (Fla App, 1987), persuasive. There, the Court rejected a similar order prohibiting parties in a partition case from purchasing the disputed property. The *Churchville* court stated:

> Neither the original record nor the supplemental record filed pursuant to an order of this court contains a stipulation or unqualified agreement by either party explicitly waiving their inherent right to bid on the property at public sale and agreeing that the order should contain such a drastic provision. We know of no legal authority for curtailing either party's rights to bid in this manner. Even though neither party wants to buy the property at the decreed sale, the provision effectively deprives each party of the right to submit a bid to protect his or her interest against sale of the property at a price far below market value. We are in sympathy with the motivations of the esteemed trial judge in this case and his attempts to deal with the bickering of these parties, but we are compelled to reverse the appealed judgment and order the quoted provision stricken. [*Id.*].

If plaintiffs purchase the cottage at the auction, ownership of the subject property would be disentangled. Most of the disagreements between the parties have been about expenses for maintenance and improvements, which would no longer be an issue once they each have sole control over their own properties. Notably, the trial court did not apportion blame for the situation, yet the restrictions seem to impact plaintiffs much more harshly than defendants. Defendants will retain the cottage that they built for themselves decades ago, but plaintiffs will lose the cottage that they have vacationed at since they were children. Also, the purpose of a public sale is to ensure competitive bidding in order to secure the highest bid. See *Schnackenberg v State Land Office Bd*, 307 Mich 1, 6; 11 NW2d 303 (1943); *Gauss v Central West Cas Co*, 289 Mich 15, 22-23; 286 NW 139 (1939); *Fletcher v Johnson*, 139 Mich 51, 53-54; 102 NW 278 (1905). In the present case, the trial court did not set a minimum price for the property. The court's exclusion of the parties and their relatives from the public sale would deprive them of the ability to protect their interests by bidding to obtain the highest possible price for the property. Thus, we are convinced that the restrictions on participation in the auction imposed by the trial court were dramatic and unnecessary.

V. THE EASEMENT

Plaintiffs also argues that the trial court erred in granting an easement for defendants to allow them to continue using the driveway over the subject property. We agree.

As stated above, a trial court's ruling on equitable matters is reviewed de novo. *Forest City Enterprises, Inc*, 228 Mich App at 67. Additionally, whether an owner's use of a servient estate is reasonably necessary to her enjoyment of her property is a question of fact, *Unverzagt v Miller*, 306 Mich 260, 266; 10 NW2d 849 (1943), and this Court review the lower court's factual findings for clear error, *Forest City Enterprises, Inc*, 228 Mich App at 67.

Plaintiff's counsel conceded at oral argument that this was not an easement by necessity. Instead he asserted that the easement was either a valid exercise of the court's discretion in ordering the partition and sale or a prescriptive easement. It is, however, axiomatic that an owner cannot exercise a hostile use of the owner's property *West Mich Dock & Market Corp v Lakeland Investments*, 210 Mich App 505; 534 NW2d 212 (1995). Therefore, the record cannot support a prescriptive easement.

The trial court granted an easement for ingress and egress without indicating if it was granting the easement as an implied easement, a prescriptive easement or in the exercise of its equitable powers. The record does contain evidence that defendants had great difficulty utilizing the sloped driveway due in part to their maturity. This might support an easement appurtenant which is more favored in Michigan law than the granted easement in gross. *Von Meding v Sahl*, 319 Mich 598, 610 NW2d 363 (1948). However, without the benefit of the trial court's thinking on this issue, we cannot determine if the easement was granted in the exercise of equity and if so, whether it was an appropriate exercise of that power. Therefore we remand this case to allow the trial court to supplement the record regarding the basis for the grant of the easement.

We reverse the trial court's judgment to the extent it prohibits the parties from participating in the public auction of the subject property. We vacate and remand for further proceeding on the grant of the easement. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly